

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0010

AZAD KARIM)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 09/12/2019
MISSION ESSENTIAL PERSONNEL)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for claimant.

Melissa M. Goins and Hanna M. Verlander (Brown Sims), Houston, Texas, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order of Administrative Law Judge Christopher Larsen (2015-LDA-00785) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the

Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

After the administrative law judge issued an order approving a Section 8(i) settlement, 33 U.S.C. §908(i), claimant's counsel filed a petition for an attorney's fee. He requested a fee of \$55,130.81, representing 82.4 hours he expended at an hourly rate of \$455, 15.75 hours by associate counsel Kim Ellis at \$365 per hour, and 21.3 hours of paralegal time at \$115 per hour, plus \$9,440.56 in costs.

The administrative law judge found counsel's evidence failed to establish a market hourly rate. Attorney Fee Order (Order) at 5-8. He therefore relied on hourly rates other administrative law judges awarded counsel.¹ *Id.* at 8-10. The administrative law judge awarded a fee based on an hourly rate of \$390 for services counsel rendered from February 2013 to March 2017. He awarded \$250 per hour for the services of Ms. Ellis and \$110 per hour for paralegal services. *Id.* He rejected employer's objections to time itemized in the fee petition, but reduced as clerical 1.1 hours of paralegal time. Order at 12. He awarded claimant's counsel a fee of \$47,806.06 payable by employer. Claimant's counsel appeals, challenging the awarded hourly rates and the reduction of paralegal time. Employer responds, urging affirmance in all respects. Claimant filed a reply brief.

Counsel challenges the rejection of his market rate evidence and contends the administrative law judge erred by not providing him an opportunity to submit additional evidence supporting the requested market rates. Counsel also contends the fee awards he received from other administrative law judges do not support the awarded hourly rates.

The lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively

¹ Specifically, the administrative law judge relied on: *Iuvale v. Coastal Marine Services*, 2015-LHC-01737 (Dec. 20, 2017), *aff'd*, BRB Nos. 18-0159/A (Dec. 13, 2018), *appeal pending*, Case No. 19-71172 (9th Cir.); *Samonte v. Tradesmen Int'l, Inc.*, 2015-LHC-00906 (Jul. 14, 2017); *Kelley v. Navy Exch. Serv. Command*, 2012-LHC-01320 (July 12, 2017); and *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, 2011-LHC-00806 (Sept. 20, 2016), *appeals dismissed*, BRB Nos. 17-0048/A (Apr. 26, 2017), *aff'd on recon. en banc*, 52 BRBS 17 (2018) (*recon. en banc*), *recon. denied*, (Oct. 4, 2018), *appeal pending*, Case No. 18-72257 (9th Cir.).

represents a “reasonable attorney’s fee” under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by that court’s decision in *Shirrod*, which reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT).

The administrative law judge provided a thorough analysis of the market rate evidence offered by counsel under applicable law and set forth a rational basis for his proxy market rate determination.² *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The administrative law judge addressed and rationally rejected the evidence counsel submitted in support of his requested hourly rate of \$455, and counsel has not established an abuse of the administrative law judge’s discretion in this regard.³ Attorney Fee Order at 3-28; *see Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff’d mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App’x 912 (9th Cir.

² Counsel does not challenge the administrative law judge’s finding that San Diego County is the relevant community. Order at 2-3. Accordingly, the administrative law judge did not err in not addressing counsel’s submission of the January 1, 2013 California Division of Workers’ Compensation memorandum, as it applies to cases in the San Francisco area. *See, e.g., Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT).

³ We reject counsel’s contention that the administrative law judge erred in considering the complexity of Longshore litigation compared to other civil litigation in reducing the hourly rate. While an administrative law judge is not permitted to consider the complexity of the case before him in setting the market rate, *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), he is entitled to determine if Longshore work is “comparable” to that of other types of cases to determine the market rate. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT).

2011). Moreover, contrary to counsel's contention, *Christensen* does not require that the administrative law judge afford him an opportunity to submit additional fee evidence. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (the administrative law judge *may* provide such an opportunity). The administrative law judge permissibly looked to four recent fee awards to counsel to formulate counsel's proxy market rate.⁴ *Id.* (tribunals need not re-analyze the hourly rate issue in every case, provided the analysis occurs with sufficient regularity to reflect current market rates). Counsel has failed to establish the administrative law judge abused his discretion. *See* Order at 8-10; *see generally* *Fox v. Vice*, 563 U.S. 826, 838, 45 BRBS 41, 45(CRT) (2011) (the essential goal in shifting fees . . . is to do rough justice); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). We, therefore, affirm the administrative law judge's proxy market rate findings of \$390 for counsel, \$250 for Ms. Ellis, and \$110 for paralegal time.

Counsel also avers the administrative law judge erred by reducing 1.1 hours of paralegal time without providing notice and an opportunity to respond. The administrative law judge stated that, on his "own motion," he would disallow as clerical/overhead 1.1 hours of time expended by the paralegal for preparing proofs of service, and to "mass copy and send out" a document. Order at 12. The administrative law judge is entitled to review the fee petition for compensability of itemized entries. However, we disagree with his characterization that time for the preparation of proofs of service is overhead. This work may be routine but it is necessary legal work. Therefore, we award .6 of an hour for this service performed on December 8, 2014, and January 12 and 28, 2015, for an additional fee of \$66.⁵ *See generally* *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *see generally* *Tahara*, 511 F.3d 950, 955-956, 41 BRBS 53, 57(CRT).

⁴ We reject counsel's contention the administrative law judge erred by relying on *Zumwalt* because the administrative law judge's analysis in that case was invalid. Having failed to timely appeal in that case, counsel may not collaterally attack the fee award to establish error in this case. Contrary to claimant's contention, the administrative law judge in *Zumwalt* did not rely only on the same evidence rejected in this case. In *Zumwalt*, the administrative law judge also relied on a declaration submitted by the employer. *Zumwalt*, 2011-LHC-00806, slip op. at 10-11.

⁵ The administrative law judge did not abuse his discretion in concluding that time spent copying and mailing is work included in office overhead and is not separately compensable.

Accordingly, we award claimant's counsel an additional fee of \$66 for .60 of an hour of paralegal time. In all other respects the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge